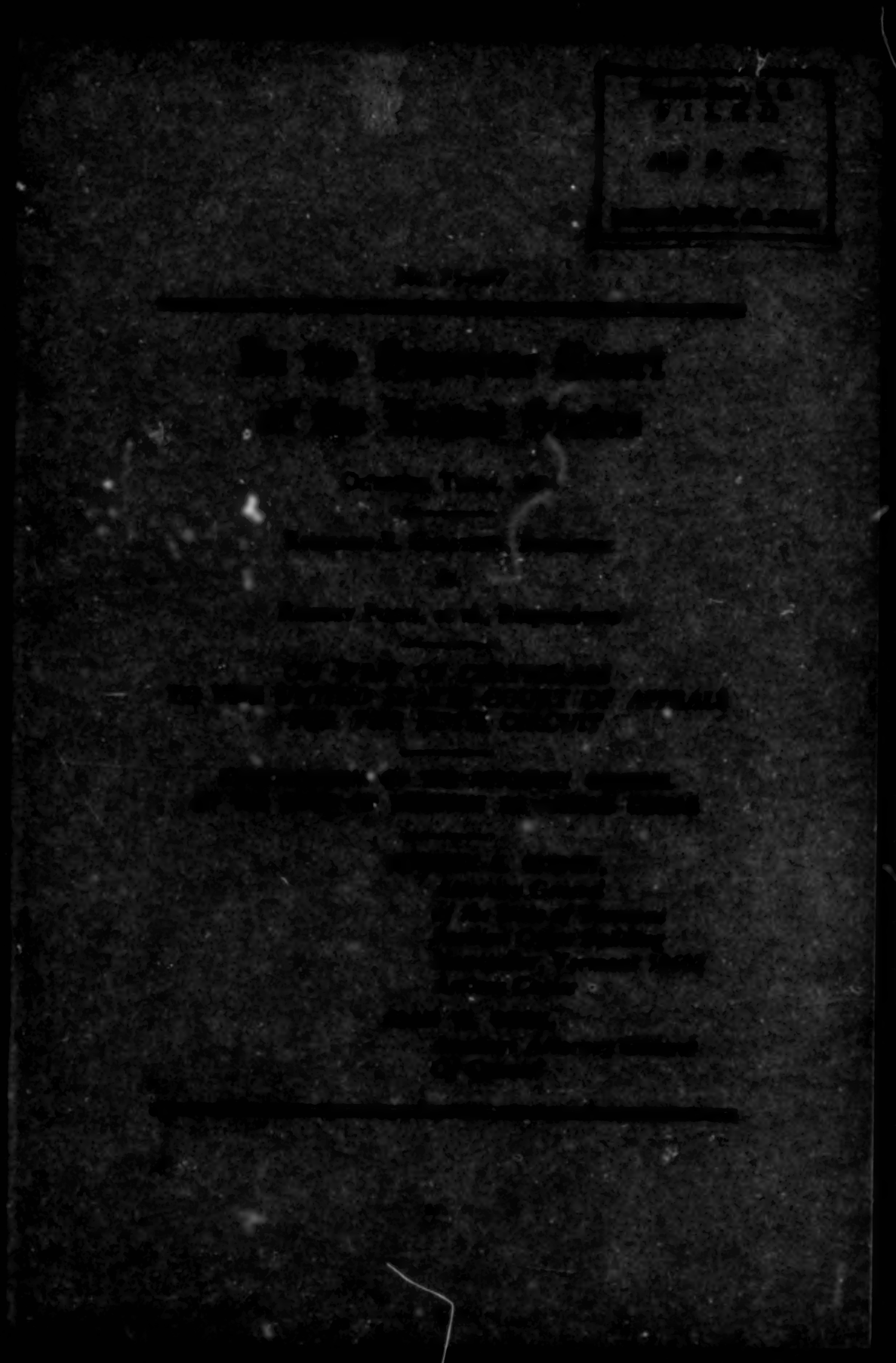

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, Petitioner

vs.

ROBERT PUGH, et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE INTEREST OF THE AMICUS CURIAE, KIMBERLY B. CHENEY

Kimberly B. Cheney is Attorney General of the State of Vermont and is charged with supervision of all criminal prosecutions in the State. 3 V.S.A. §153(a). He is also the Chairman of the Vermont Supreme Court Criminal Rules Advisory Committee that prepared the Vermont Rules of Criminal Procedure which became effective on October 1, 1973. The decision in this case could have a substantial impact on those Rules and practice in the State of Vermont in the area of pre-trial criminal procedure.

ARGUMENT

Because the issue before this Court on Certiorari concerns the procedure of prosecution upon information and the constitutional necessity of preliminary hearings before a magistrate, the Attorney General of Vermont submits this brief statement of his views *amicus curiae* on that question.

The Florida procedural framework considered below differs considerably from that present in Vermont. The purpose of this memorandum is thus twofold. The first is to apprise the Court of Vermont practice in the hope that this Court's decision will not place the constitutional validity of this procedure in doubt. The second is to suggest that the unique procedure of Vermont should be considered as a viable and sensible national model. However, as this brief can only highlight the key features of Vermont practice, pertinent sections of the Vermont Rules of Criminal Procedure (V.R.Cr.P.) and Reporter's Notes are reprinted in the Appendix for the Court's perusal in detail.

Vermont criminal procedure has recently undergone substantial revision. This stems from the promulgation by the Vermont Supreme Court of the new Vermont Rules of Criminal Procedure in January 1973. Following ratification by the General Assembly these Rules became effective on October 1, 1973.[1] The purpose of the new Rules was best described by the then Vermont Chief Justice in January of this year when he said:

> The Rules of Criminal Procedure are an attempt to create a new and streamlined code of criminal procedure for Vermont, combining our own experience and the most advanced thinking in the realm of procedural reform. The purposes of the rules are those set forth in Rule 2: "To provide for the just determination of every criminal proceeding . . . To secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." Accordingly, the rules not only carry forward features of our present customary and statutory practice which serve these purposes, but also draw heavily upon the American Bar Association's Minimum Standards for Criminal Justice, the Federal Rules of Criminal Procedure and proposed amendments thereto, and procedural codes of other states, all of which have the same goals.
> *Forward* by Chief Justice Percival L. Shangraw, pp. XXIX, V.R.Cr.P.

[1] Discussion of the Vermont Rules in this brief is largely drawn from the Reporter's Notes annotating each Rule. These Notes were prepared by Professor L. Kinvin Wroth of the University of Maine Law School who was appointed Reporter in July 1971. Citations to specific Rules in this brief import consideration of the body of the Rule and, where appropriate, Professor Wroth's commentary.

Pre-trial procedure and arrest upon information in Vermont is governed principally by Rules 3, 4, 5, 12, 15 and 16, V.R.Cr.P. Particularly relevant for purposes of this discussion are Rules 3(a)(b), 4(a)(b), 5(a)(c), 12(e), 15(a) and 16, V.R.Cr.P. (See Appendix).

I. Arrest Validation

Vermont Rules do not provide an automatic adversary preliminary hearing where the prosecution is forced to present a *prima facie* case. However, there is an independent finding of probable cause to arrest. Thus, Vermont does not suffer from the shortcoming of Florida practice perceived by the Court of Appeals. Rules 4(b) and 5(c), V.R.Cr.P. and Reporter's Notes. In Vermont, a law enforcement officer may arrest without warrant any person whom the officer has probable cause to believe has committed a crime in his presence. He may also arrest without warrant a person who he has probable cause to believe has committed or is committing a felony. The degree of probable cause required is based on the same evidence necessary for a summons or arrest warrant in a prosecution by information. Rules 3(a), 4(b), V.R.Cr.P. The arresting officer may issue the detained individual a citation to appear before a judicial officer in lieu of further detention. Otherwise, the arrestee must be taken before the nearest available judicial officer "without unneces-

sary delay." An information and affidavit must be filed with or made before the judicial officer at that time. Rule 3(b), V.R.Cr.P. Once the warrantless arrestee is before the judicial officer, the judicial officer determines whether there is probable cause to believe an offense has been committed and that the defendant has committed it. If no probable cause is found, the information is dismissed and the defendant discharged. Rule 5(c), V.R.Cr.P.

In a prosecution commenced by information, a State's Attorney cannot issue an arrest warrant himself but must request a judicial officer to issue either a summons or arrest warrant. He does so by presenting an information and affidavit or sworn statement made before the judicial officer as to probable cause. Rule 4(a), V.R.Cr.P. No summons or warrant can issue upon information unless the court finds that there is probable cause to believe that an offense has been committed, and the defendant has committed it. This finding must be based on substantial evidence and may include reliable hearsay. During this proceeding the prosecutor and any affiants may be required to appear personally and be examined under oath. The record of proceedings becomes a part of the affidavit. Rule 4(b), V.R.Cr.P.

Even after a finding of probable cause, however, the judicial officer is still encouraged to issue a summons, and may only issue an arrest warrant in limited situations. Rule 4(c), V.R.Cr.P.[2] As is the case with warrantless arrests under Rule

[2] If the offense charged is a misdemeanor, a summons must be issued unless the judicial officer finds that (a) the defendant has previously failed to respond to a citation, summons, warrant, or other order of the court, or (b) the defendant has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood he will refuse to respond to a summons, or (c) the whereabouts of the defendant are unknown and a warrant is necessary in order to subject him to the jurisdiction of the court, or (d) arrest is necessary to prevent bodily injury to the person or to the person of another or harm to property. If the offense charged is a felony, a summons for appearance must be issued in lieu of arrest warrant unless there is reasonable cause to believe that if not taken into custody the defendant will flee to avoid prosecution, will fail to respond to the summons, or will cause bodily injury to himself or to another or injury to property. Rule 4(c), V.R.Cr.P.

3, the arrestee on a judicial warrant issued following the filing of an information must be brought before the court "without unnecessary delay". Rule 4(f)(2)(c), V.R.Cr.P. At that hearing, no new determination of probable cause is made in the information case, nor is there an adversary preliminary examination of probable cause for the warrantless arrestee.

However, the arrestee on judicial warrant like the warrantless arrestee must be informed (a) of the charge against him and the minimum and maximum punishments, and provided with a copy of the information, (b) of his rights relative to counsel, retained or appointed, (c) of his rights relative to self incrimination and (d) how he may secure pretrial release, the schedule of further trial proceedings and of his rights relative to discovery and omnibus hearing. Rule 5(d), V.R.Cr.P. Also at that time, the court must determine the conditions of his pre-trial release. Rule 5(g).[3]

II. Optional Expedited Adversary Hearing

Rule 12(e)(1), V.R.Cr.P. provides that at any time after arraignment the defendant may move for dismissal of the information on the ground that the prosecution is unable to make a prima facie case against him. This motion must be heard at the omnibus hearing or upon completion of discovery, whichever is later. Rule 12(e), V.R.Cr.P. Normal-

[3] Vermont practice on pre-trial release parallels the American Bar Association's Minimum Standards, encourages release on personal recognizance and provides alternatives other than cash bail. Rule 5(g), V.R.Cr.P. and Reporter's Notes.

ly, if no expedited hearing is requested by defense counsel, this omnibus hearing is held 30 days after arraignment and arraignment is at least 24 hours after the Rule 5 hearing. Rules 12(f) and 5(f), V.R.Cr.P. If at that omnibus hearing, the prosecution fails to establish by affidavits, depositions, sworn oral testimony or other admissable evidence that it has substantial, admissable evidence of the offense challenged sufficient to withstand a motion for judgment of acquittal at trial, the court must dismiss the information and discharge the defendant. Rule 12(e), V.R.Cr.P.

However, Vermont's unique and speedy discovery procedure[4] also interacts with Rules 12(e) and 5 to promote judicial efficiency, narrow the issues and provide for rapid disposition and release where appropriate. Rule 12(e) has often been called a criminal motion for summary judgment which parallels the similar device available in civil practice. See Rule 56, Vermont Rules of Civil Procedure; Rule 56, Federal Rules of Civil Procedure; Rule 12(e)(2), V.R.Cr.P. and Reporter's Notes. This is because a Rule 12(e)(1) motion may be made at any time after arraignment.

As emphasized in the Reporter's Notes, a hearing on that motion may be expedited in a clear case where there is a dispositive issue that could end the matter. For example, an issue of mistaken identity could be promptly resolved at the Rule 5 hearing by a defense request for immediate arraignment and omnibus hearing. Rules 5(f), 12(e), (f) and Reporter's Notes. This is feasible because under the broad criminal discovery permitted in Vermont, the defendant may take the deposition of any witness immediately after the

[4] Vermont has pioneered in the concept of broad criminal discovery. See for example P. F. Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (June 1967). This procedure complements the expedited hearing potential provided in Rules 5(f) and 12(e), V.R.Cr.P.

filing of the State's Attorney's information. Rules 15(a) and 16, V.R.Cr.P. In short, Vermont procedure is flexible enough to permit immediate defense discovery and summary disposition where appropriate. Moreover, this procedure results in economies of judicial, police and prosecutorial time because adversary hearings are only conducted after defense counsel, through discovery, has determined that there is a genuine issue to be litigated.

In contrast to the practice in some jurisdictions, the failure of Rule 12 to provide an automatic adversary preliminary hearing is unique. However, this practice is based on the assumption that the Vermont method is constitutionally sufficient in view of the fact that the process of arrest validation, bail and binding the defendant over for trial are adequately covered by Rules 3, 4, and 5, V.R.Cr. P. This assumption is buttressed by the fact that the omnibus hearing required by Rule 12(f) and the extensive discovery permitted by Rules 15 and 16 further guard against unnecessary detention. This is especially true in view of the means to expedite this procedure discussed above. Rule 12, V.R.Cr.P. and Reporter's Notes.

With this background, we should compare Vermont practice with that encountered in the instant case. The primary evil perceived by the Court of Appeals below, the practice of considering the State's Attorney a sufficient judge of probable cause to arrest, does not exist in Vermont.[5] There is judicial scrutiny, albeit *ex parte*, prior to arraignment.[6] Unlike the Florida situation, Vermont detentioners cannot be held over 30 days (i.e. until arraignment) without a judicial examination of the merits of their pre-trial release.[7]

[5] 483 F.2d 782, 787.

[6] Arraignment may be held as part of Rule 5 proceedings if the defendants request. Otherwise, it is set for a later time. Rule 5(f), V.R.Cr.P.

[7] 483 F.2d 780, 782; Rules 3, 4, and 5, V.R.Cr.P. and Reporter's Notes.

This matter is explored at the Rule 5 hearing which must be held "without unnecessary delay". Rules 4(f)(2)(C) and 5(a), (c), (g), V.R.Cr.P. and Reporter's Notes. See also *McNabb* v. *United States*, 318 U.S. 322 (1943); *Mallory* v. *United States* 354 U.S. 449 (1957); *Miranda* v. *Arizona*, 384 U.S. 436 (1966) at 463 n.32; *United States* v. *Keeble*, 459 F.2d 757 (8th Cir. 1972).

In short, the Vermont system is far superior to the procedural framework sustained in *Shadwick* v. *Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1971). In *Shadwick*, the petitioner challenged the issuance of warrants by clerks of the Municipal Court on the theory that they were not neutral and detached magistrates within the ambit of the Fourth Amendment of the United States Constitution. This Court disagreed, holding that the clerks were judicial officers. It was explained that:

> The warrant traditionally has represented an independent assurance that [an] . . . arrest will not proceed without probable cause to believe that a crime has been committed and that the person . . . named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest . . . This court long has insisted that inferences of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise, of ferreting out crime. [Citations omitted] *Id.* at 350, 92 S.Ct. at 2122.

There is no question that Vermont practice surpasses the standards of *Shadwick*, supra. Vermont procedure requires a judge, rather than a court clerk to find probable cause for an arrest, and the defense may avail itself of the Rule 12 procedure.

It should also be noted that the distinction made in Florida

(Amended Rule 3.131, 33 F.S.A.) between felons and misdemeanants for purposes of the availability of probable cause hearings does not exist in Vermont. Probable cause is determined by a judicial officer, either before or "without unnecessary delay" after every arrest, regardless of the classification of the offense. This is true whether arrest is without warrant or upon a judicial warrant following the filing of an information. In fact, Vermont Rules strongly encourage the issuance of a citation to appear in misdemeanor cases in lieu of either a warrantless arrest or issuance of a warrant. Rules 3 and 4, V.R.Cr.P.

Finally, Vermont has no equivalent to the Florida practice of delayed probable cause hearings in capital or life imprisonment cases. Amended Rule 3.131(b), 33 F.S.A. Once again, it is the fact of a warrantless arrest or the potential for arrest in an information situation which triggers the probable cause hearing. The penalty or nature of the offense alleged plays no part in the matter. Rules 3, 4, and 5, V.R.Cr.P.

CONCLUSION

This brief was designed to acquaint the court with the unique yet sound Vermont Rules of Criminal Procedure dealing with prosecution upon information and arrest. The paramount deficiency in Florida practice which impressed the courts below, the absence of an impartial judicial determination of probable cause in information prosecutions, does not exist in Vermont. Likewise, Vermont makes no distinction relative to the availability of a probable cause hearing because the offense is denominated a felony or misdemeanor; nor do the Vermont Rules establish a separate time frame for capital offenses or those requiring life imprisonment.

In short, Vermont information practice comports with the Constitution and has none of the evils perceived by the courts below. Therefore, it is hoped that any relief framed

in this case will be sufficiently limited to avoid placing the constitutionality of the present Vermont procedure in doubt.

Respectfully submitted,

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APPENDIX

Rules 3, 4, 5, 12, 15(a), 16

VERMONT RULES OF CRIMINAL AND APPELLATE PROCEDURE

RULE 3. ARREST WITHOUT WARRANT; CITATION TO APPEAR

(a) ARREST WITHOUT WARRANT. A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay thereafter. An officer may also arrest without warrant a person whom the officer has probable cause to believe has committed or is committing a felony. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4(b).

(b) SAME: PROCEDURE. A person arrested without warrant shall either be released in accordance with subdivision (c) of this rule or shall be brought before the nearest available judicial officer without unnecessary delay. The information and affidavit or sworn statement required by Rule 4(a) shall be filed with or made before the judicial officer when the arrested person is brought before him.

(c) CITATION TO APPEAR BEFORE A JUDICIAL OFFICER.

(1) *Mandatory Issuance.* A law enforcement officer acting without warrant who has grounds to arrest a person for a misdemeanor shall, except as provided in paragraph (2) of this subdivision, issue a citation to appear before a judicial officer in lieu of arrest. In such circumstances, the law enforcement officer may stop and briefly detain such person for the purpose of determining whether any of the excep-

tions in paragraph (2) applies, and issuing a citation, but if no arrest is made, such detention shall not be deemed an arrest for any purpose. When a person has been arrested without warrant, a citation to appear in lieu of continued custody shall be issued as provided in this rule if (A) the charge for which the arrest was made is reduced to a misdemeanor and none of the exceptions in paragraph (2) applies, or (B) the arrest was for a misdemeanor under one of the exceptions in paragraph (2) and the reasons for the exception no longer exist.

(2) *Exceptions.* The citation required in paragraph (1) of this subdivision need not be issued, and the person may be arrested or continued in custody, if

(A) A person subject to lawful arrest fails to identiy himself satisfactorily; or

(B) Arrest is necessary to obtain nontestimonial evidence upon the person or within the reach of the arrested person; or

(C) Arrest is necessary to prevent bodily injury to the person arrested or to the person of another, harm to property, or continuation of the criminal conduct for which the arrest is made; or

(D) The person has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood that he will refuse to respond to a citation; or

(E) The person has previously failed to appear in response to a citation, summons, warrant or other order of court issued in connection with the same or another offense.

(3) *Discretionary Issuance in Cases of Felony.* A law enforcement officer acting without warrant may issue a citation to appear in lieu of arrest or continued custody to a person charged with any felony where arrest or continued custody is not patently necessary for the public safety and such facts as the officer is reasonably able to ascertain as to the person's place and length of residence, family relationships, references, past and present employment, his criminal record, and other relevant matters satisfy the officer that the person will appear in response to a citation.

(4) *Discretionary Issuance by Prosecuting Officer.* A prosecuting officer may issue a citation to appear to any person whom the officer has probable cause to believe has committed a crime. The citation shall be served as provided for service of summons in Rule 4(f)(1) of these Rules. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4(b).

(5) *Form.* The citation to appear shall be dated and signed by the issuing officer and shall state the name of the person to whom it is issued and the offense for which he would have been arrested or continued in custody. It shall direct the person to appear before a judicial officer at a stated time and place.

(6) *Filing Citation and Information with Judicial Officer.* A copy of the citation to appear, signed by the officer issuing it, and the information and affidavit or sworn statement required by Rule 4(a), shall be filed with or made before the judicial officer at the time for appearance stated in the citation.

RULE 4. SUMMONS OR ARREST WARRANT UPON INDICTMENT OR INFORMATION

(a) Application to Judicial Officer. A prosecuting officer may request a judicial officer to issue a summons or arrest warrant for any defendant, not already arrested or cited to appear for the same offense, who is named (1) in an indictment presented on oath of the foreman of a grand jury or (2) in an information presented on oath of the prosecuting officer accompanied by an affidavit or affidavits or a sworn statement made before the judicial officer as to probable cause. Any sworn statement so made shall be taken

down by a court reporter or recording equipment. The prosecuting officer shall present with his application such information as reasonable investigation would reveal concerning the defendant's (i) residence, (ii) employment, (iii) family relationships, (iv) past history of response to legal process, and (v) past criminal record. At the time when an information or indictment is presented to him, the judicial officer shall make a minute thereon in writing, under his official signature, of the date on which the same was presented.

(b) FINDING OF PROBABLE CAUSE UPON INFORMATION. No summons or warrant shall be issued upon information unless the judicial officer finds that there is probable cause to believe that an offense has been committed and that the defendant has committed it. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided that there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a summons or warrant, the judicial officer may require the prosecuting officer and affiant or affiants to appear personally and may examine under oath the affiant or affiants and any witnesses the prosecuting officer may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment, or the judicial officer shall promptly make a summary of it. Such record or summary shall be made part of the affidavit.

(c) ISSUANCE OF SUMMONS. Upon an indictment or upon an information and finding of probable cause,

(1) If the offense charged is a misdemeanor, the judicial officer shall issue a summons for the appearance of the defendant before a judicial officer, unless he finds that

(A) The defendant has previously failed to respond to a

citation, summons, warrant, or other order of court issued in connection with the same or another offense; or

(B) The defendant has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood that he will refuse to respond to a summons; or

(C) The whereabouts of the defendant are unknown and the issuance of an arrest warrant is necessary in order to subject him to the jurisdiction of the court; or

(D) Arrest is necessary to prevent bodily injury to the person arrested or to the person of another or harm to property.

(2) The judicial officer shall likewise issue a summons in any case in which the prosecuting officer so requests.

(3) If the offense charged is a felony, the judicial officer may issue a summons for the appearance of the defendant unless there is reasonable cause to believe that, if not taken into custody, the defendant will flee to avoid prosecution, will fail to respond to the summons, or will cause bodily injury to himself or to another or injury to property.

(4) The summons shall be issued to the prosecuting officer for delivery to the person who is to make service and the judicial officer shall file a copy of the summons and indictment or information and affidavit or sworn statement in the County Court or territorial unit of the District Court having jurisdiction of the offense.

If the defendant fails to appear in response to the summons, a warrant may be issued on the basis of the same indictment or information.

(d) ISSUANCE OF ARREST WARRANT. Upon an indictment or upon an information and finding of probable cause in any case in which the judicial officer does not issue a summons as provided in subdivision (c), he shall issue a warrant for the arrest of the defendant to any law enforcement officer authorized by these rules to execute it. The

judicial officer shall file a copy of the warrant and the indictment or information and affidavit or sworn statement in the County Court or territorial unit of the District Court having jurisdiction of the offense.

(e) FORM.

(1) *Summons.* The summons shall be dated and signed by the judicial officer. It shall be directed to the defendant and shall summon him to appear before a judicial officer at a stated time and place. It shall describe in general terms the offense charged in the indictment or information.

(2) *Arrest Warrant.* The arrest warrant shall be in the same form as the summons, except that it shall be directed to any law enforcement officer and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall command that the defendant be arrested and brought without unnecessary delay before the nearest available judicial officer.

(f) SERVICE OR EXECUTION; RETURN.

(1) *Service of Summons.*

(A) *By Whom.* The summons may be served by any person authorized by the Vermont Rules of Civil Procedure to serve process in a civil action or by any law enforcement officer.

(B) *Territorial Limits.* The summons may be served at any place within the state of Vermont.

(C) *Manner.* The summons shall be served upon a defendant by any means provided by the Vermont Rules of Civil Procedure for service of process within the state in a civil action. In addition, service may be by registered or certified mail, return receipt requested, with instructions to deliver to addressee only. Service by mail shall be complete when the mail is delivered and the return receipt signed or when acceptance is refused.

(D) *Return.* On or before the return day the person to whom a summons was delivered for service shall make return thereof, with the indictment or information and affidavit or sworn statement, to the judicial officer before whom the defendant was summoned to appear. If service was by mail, the return shall consist of the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons was sent to the defendant by ordinary first-class mail. At the request of the prosecuting officer made at any time while the indictment or information is pending, a summons returned unserved, or a duplicate thereof, may be delivered by the judicial officer to any officer or appropriate person for service.

(2) *Execution of Warrant.*

(A) *By Whom.* The warrant may be executed by any law enforcement officer.

(B) *Territorial Limits.* The warrant may be executed at any place within the state of Vermont.

(C) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as practicable and at that time shall deliver to the defendant a copy of the warrant. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The officer executing the warrant shall bring the defendant without unnecessary delay before the nearest available judicial officer.

(D) *Return.* The officer executing a warrant shall make return thereof, with the indictment or information and affidavit or sworn statement, to the judicial officer before whom the defendant is brought. At the request of the prosecuting officer, any unexecuted warrant shall be returned to

any judicial officer and cancelled by him. At the request of the prosecuting officer made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the judicial officer to any officer or appropriate person for execution.

RULE 5. APPEARANCE BEFORE A JUDICIAL OFFICER

(a) IN GENERAL. When a person arrested with or without a warrant, or served a citation or summons, is brought or appears before a judicial officer as provided in Rules 3 and 4, the judicial officer shall proceed in accordance with this rule. All proceedings except those under subdivision (b) of this rule shall be taken down by a court reporter or recording equipment.

(b) TEMPORARY RELEASE PENDING APPEARANCE. The presiding judge of each County Court and the judge of each territorial unit of the District Court shall establish procedures and standards by which persons arrested with or without warrant other than during normal business hours may be released pending appearance under this rule. Such appearance shall be held as soon as possible after release.

(c) INITIAL DETERMINATION OF PROBABLE CAUSE. If the defendant was arrested without a warrant or appeared in response to a citation issued under Rule 3 and the prosecution is upon information, the judicial officer shall determine in the manner provided in Rule 4(b) for issuance of summons or warrant whether there is probable cause to believe that an offense has been committed and that the defendant has committed it. If the judicial officer does not find probable cause, he shall dismiss the information without prejudice and discharge the defendant. Upon conclusion of proceedings under this rule, the judicial officer shall file the indictment or information and affidavit or sworn statement in the

County Court or territorial unit of the District Court having jurisdiction of the offense.

(d) STATEMENT BY THE JUDICIAL OFFICER. The judicial officer shall inform the defendant before taking any further action under this rule

(1) Of the charge against him and the minimum and maximum punishments for it and provide him with a copy of the indictment or information and affidavit or sworn statement;

(2) Of his right to retain and consult counsel before making any statement or answering any questions at the present hearing or subsequently; in an appropriate case, of his right to request the assignment of counsel at state expense if he is financially unable to retain counsel; and of his right to communicate with counsel, family, or friends;

(3) That he is not required to make any statement or answer any questions at the present hearing or subsequently and that anything he says may be used against him;

(4) Of the general circumstances under which he may secure pre-trial release; and,

(5) If he is not represented by counsel, of the nature and approximate schedule of further pre-trial proceedings to be taken in the case and of his rights to discovery and an omnibus hearing.

(e) ASSIGNMENT OF AND CONSULTATION WITH COUNSEL. No further proceedings shall be had until counsel has been assigned, if the case is an appropriate one for such assignment, and until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(f) DETERMINATION OF ARRAIGNMENT DATE. If the defendant is not discharged under subdivision (c), the judicial officer shall, upon consultation with the prosecuting officer and the defendant or his counsel, set a date and time

for arraignment which shall be within a reasonable time, but in no event less than 24 hours, after the time of such determination, except at the request of the defendant. If the judicial officer is a Superior or District Judge sitting in the County Court or territorial unit of the District Court having jurisdiction of the offense, he may, if the defendant so requests, conduct the arraignment forthwith as part of the proceedings under this rule, or he may order the defendant to appear before him at a later date and time. Otherwise, the judicial officer shall order the defendant to appear for arraignment in the court having jurisdiction at the date and time set.

(g) PRE-TRIAL RELEASE. If the defendant has been arrested and is not released upon citation under Rule 3(c) or discharged under subdivision (c) of this rule and the prosecuting officer does not stipulate to the release of the defendant on his own recognizance, the judicial officer shall determine whether and on what conditions the defendant shall be released pending trial in accordance with the standards provided in Rule 46.

—Amended Dec. 19, 1973, eff. Jan. 1, 1974.

RULE 5. REPORTER'S NOTES

This rule departs significantly from Federal Rules 5 and 5.1. The rule is in part based upon ABA Minimum Standards (Pretrial Release) §§4.1-4.5. It contains, however, several features unique to these rules that to some extent reflect prior Vermont practice. Basically, the rule provides an initial appearance before a judicial officer for every defendant whether cited or summoned to appear or arrested with or without warrant. Note that a "judicial officer" for purposes of this rule is a Superior or District Judge or an acting District Judge. Rule 54(c)(4). The function of the appearance is to dispose of a variety of preliminary matters, including the determination of probable cause for those arrested without warrant or cited to appear under Rule 3, a statement to the defendant of the charge and his rights, assignment of counsel, arraignment or the determination of a date for arraignment, and the conditions of pretrial release under Rule 46. Questions pertaining to the merits of the charge are largely left to motion practice under Rule 12 and discovery under Rules 15-16.2.

The rule consolidates and makes mandatory a number of features of prior Vermont practice. Under the former municipal court practice, a defendant, upon arrest, was to be brought forthwith before a justice of the peace or municipal court. If the offense charged was beyond the jurisdiction of the municipal court, he was to be examined and bound over to the County Court. See 13 V.S.A. §§5507-5508 (repealed by Act No. 118 of 1973, §25), 5551-5553 (repealed by Act No. 258 of 1971, §19). The Court had held that, at least in felonies, probable cause was properly in issue in the binding-over proceedings, which were treated as a kind of preliminary examination. In re Davis, 126 Vt. 142, 224 A.2d 905 (1966). In the District Court and County Courts, 13 V.S.A. §5653 (repealed by Act No. 118 of 1973, §25) required that a person arrested upon information be brought "as soon as possible" before a judicial officer, which by statute included a court clerk. The judicial officer was thereupon to fix bail in accordance with 13 V.S.A. §7553a. The Public Defender Act, 13 V.S.A. §§5234, 5235, required the giving of notice of the right to counsel and notification of the Public Defender at the earliest judicial appearance. Although the practice under these provisions was not uniform, in many courts these functions where possible were combined with a probable cause hearing and arraignment in a single proceeding not unlike that contemplated under Rule 5. See In re Mahoney, 128 Vt. 462, 266 A.2d 444 (1970). The

Court recently held that a defendant arrested upon warrant has the right to a probable cause hearing on motion before trial. State v. Perry, 131 Vt. 75, 300 A.2d 615 (1973).

Rule 5(a) makes clear that proceedings under this rule occur regardless of the means by which the prosecution has been commenced. See Reporter's Notes to Rules 3 and 4. A verbatim record is required because of the importance of the matters considered, especially the probable cause determination under subdivision (c), the judicial officer's Miranda warning under subdivision (d), the assignment of counsel under subdivision (e), and arraignment or determination of the date thereof under subdivision (f). See ABA Minimum Standards (Pretrial Release) §4.3(c) cf; 13 V.S.A. §5234 (c)(1). Of course, if the prosecution fails to present an indictment or information at the defendant's appearance under this rule as required by Rules 3(b), 3(c)(6), 4(f)(1)(D), and 4(f)(2)(D), the defendant should be discharged without prejudice to the prosecution, unless the prosecution shows cause for a brief continuance to enable it to produce the appropriate document. See Rule 48(b)(2). Cf. 13 V.S.A. §5654 (repealed by Act No. 118 of 1973, §25). The defendant may waive appearance under Rule 43(c)(2).

Rule 5(b) provides for a procedure similar to that followed in many District and County courts under prior Vermont practice. Under Rules 3(b) and 4(f)(2)(C), a person arrested with or without warrant is to be brought "before the nearest available judicial officer without unnecessary delay." This phrase, taken from Federal Rule 5(a), has a long history of interpretation in the federal courts, which will serve as a guide to its construction under these rules. For a full discussion, see Reporter's Notes to Rule 3(b). The appearance under Rule 5 is the procedural step which ultimately satisfies the requirement embodied in the phrase. It may be difficult, however, to locate a judicial officer when an

arrest occurs late at night or on a weekend. Yet, the circumstances of a warrantless arrest may be such that the arresting officer is unwilling to issue a citation, or the arrest may be upon warrant, giving the officer no such alternative. The federal courts have held that it is not "unnecessary delay" to defer the appearance until the regular business hours of the magistrate, although some courts have reasoned that the police may not continue interrogation during the prolonged unavailability of a magistrate. Compare Williams v. United States, 273 F.2d 781 (9th Cir.), cert. denied 362 U.S. 951 (1959), with Mitchell v. United States, 316 F.2d 354 (D.C. Cir. 1963). See 1 Wright, Federal Practice and Procedure §74, at pp. 97-99 (1969).

To alleviate the problem of continued detention during the unavailability of a magistrate, which is the principal target of the "unnecessary delay" rule, Rule 5(b) requires the trial courts to provide for temporary release of persons arrested other than during normal business hours. The exact form of the procedures and standards to be established is left to local practice and convenience. Possible procedures might include delegation of the responsibility for temporary release to the clerk or an arrangement for telephonic communication with a given judicial officer, who would agree to be "on call" for a particular area at a particular time. The standards to be applied should be based on those found in Rules 3(c) and 4(c) for the issuance of citations and summons, as well as upon those contained in the Bail Act, 13 V.S.A. §7553a (incorporated in these rules by Rule 46). As under those provisions, release on conditions other than cash bail or bond should be used if possible. See Reporter's Notes to Rules 3(c), 4(c), and 46(a).

If the defendant is released on a temporary basis, the "without unnecessary delay" requirement of Rules 3(b) and 4(f)(2)(C) has been met, because its basic purpose — pre-

vention of continuing interrogation of an uncounselled, uncharged defendant—has been satisfied. Rule 5(b) nevertheless requires that the Rule 5 appearance be held "as soon as possible after release." In ordinary circumstances this should be deemed to be at the commencement of the next regular business hours of the nearest available judicial officer. If the defendant is not released under Rule 5(b), either because release is denied or because he cannot meet the conditions set, the "without unnecessary delay" requirement still controls. In line with the federal cases previously cited, such a defendant's appearance should be delayed only as long as absolutely necessary and extreme caution should be used in any interrogation or other investigation carried out during the period of delay.

Rule 5(c) provides the only consideration of the merits of the charge which will ordinarily be undertaken at the Rule 5 appearance. The proceeding under this subdivision is intended to be an ex parte determination of probable cause made by the judicial officer for persons cited to appear or arrested without warrant under Rule 3. This determination is to be made on exactly the same basis and in the same manner as the probable cause determination under Rule 4(b) prior to the issuance of a summons or arrest warrant. The purpose of the determination, like the purpose of that under Rule 4(b), is only the evaluation of the existence of probable cause at the time of the citation or arrest and the consequent validation or invalidation of the actions of the law enforcement officer involved. This provision, like the Rule 4(b) determination, is not applicable to prosecutions upon indictment, which embody their own probable cause determinations. See Reporter's Notes to Rule 4(b). Because of its limited purpose, Rule 5(c) provides no opportunity for the defendant to cross-examine witnesses or present evidence or argument in his own behalf. At the conclusion of the Rule

5(c) proceedings, the defendant is either discharged or remains before the court ready for the remainder of the Rule 5 procedure as does the person summoned or arrested on warrant after a preliminary probable cause determination.

Rule 5(c) thus serves only the purpose of assuring for all defendants pretrial validation of the grounds for commencing the prosecution. Such a proceeding is probably required by the 4th and 14th Amendments, although the authorities are by no means clear. In general, an illegal arrest without more does not invalidate subsequent proceedings against a defendant thereby in custody. Frisbie v. Collins, 342 U.S. 519 (1952); In re Greenough, 116 Vt. 271, 75 A.2d 569 (1950). Moreover, the United States Supreme Court has held that in a state proceeding there is no constitutional requirement that a preliminary examination precede the commencement of proceedings by information. Lem Woon v. Oregon, 229 U.S. 586 (1913). Recent lower federal court cases suggest, however, that in cases of arrest without warrant an after-the-fact determination of probable cause is a constitutional requirement. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971); Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); cf. Morrissey v. Brewer, 408 U.S. 471 (1972); cf. State v. Perry, supra.

Regardless of constitutional requirements, the limited probable cause determination provided by Rule 5(c) is justified as a matter of policy and administrative efficiency. An early check on the validity of a citation or arrest not only encourages careful police practices in an area where significant invasions of privacy are involved but screens out at an inexpensive preliminary stage cases which might later be dismissed in any event as a result of the suppression of critical evidence obtained pursuant to an illegal arrest. See Ker v. California, 374 U.S. 23 (1963). If the state in fact has probable cause at the time of the dismissal that was not apparent

at the time of the arrest, it may commence proceedings over again by a proper citation or arrest.

The ex parte proceeding under Rule 5(c), with its arrest-validation purpose, is not to be confused with the adversary preliminary examination or hearing provided for in many state procedural systems and by Federal Rules 5 and 5.1, which may serve two further purposes: (1) As a binding-over proceeding at which the state's witnesses are subject to the defendant's cross-examination and the counterbalancing effect of the defendant's own witnesses, the preliminary examination acts as a screening device — eliminating cases in which the state may have been able to establish probable cause for arrest but cannot establish probable cause to hold the defendant for trial. Cf. State v. Perry, supra. (2) The examination also may have a discovery function, giving the defendant a preliminary run-through of the state's case and what amounts to a free opportunity to depose the state's witnesses. See Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing, 67 Mich. L. Rev. 1361, 1396-1399 (1969) 1 Wright, supra, §80, at pp. 137-140; cf. Coleman v. Alabama, 399 U.S. 1 (1970).

There is presumably no Federal or state constitutional right to a preliminary examination serving these additional purposes, at least where the prosecution is upon indictment or information, as all prosecutions under these rules must be. See Sciortini v. Zampano, 385 F.2d 132 (2d Cir. 1967), cert. denied 390 U.S. 906 (1968). The amendment of Federal Rule 5(c), effective October 1, 1972, makes clear that no examination is required in the federal system in prosecutions upon indictment or information. Federal Rule 5.1, promulgated at the same time, allows hearsay evidence to be considered at examinations held in prosecutions upon complaint, thus undetermining the screening purpose even in such cases. See Federal Advisory Committee's Note, 56 F.R.D.

143, 149-150, 152-154 (1972). It is improbable that the Supreme Court would impose more rigorous requirements upon state courts. Prior Vermont decisions requiring an adversary post-arrest probable cause hearing should be read as reflecting the Court's concern for a proper review of probable cause to arrest under the former system permitting an arrest warrant to issue upon the state's attorney's information and oath alone. In re Davis, supra; State v. Perry, supra.

In any event, the Vermont rules supply alternative means for meeting the needs which are the object of these two further purposes of the preliminary examination. (1) The screening purpose of the examination is served by various motions to dismiss available under Rule 12, including especially the motion to dismiss for failure to make out a prima facie case provided under Rule 12(e). By that motion the defendant can challenge the factual or legal sufficiency of the prosecution's evidence in advance of trial. See Reporter's Notes to Rule 12(e). The motion must be made after arraignment and in the usual case is to be heard at the omnibus hearing under Rule 12(f), in order to allow time for the completion of discovery. This procedure, however, may be conducted at the time of the Rule 5 appearance or shortly thereafter in a clear case with a single dispositive issue, such as a question of mistaken identity. Rule 5(f) permits the arraignment to be held at the Rule 5 hearing with the consent of the defendant. Under Rule 12(f)(1), on motion for cause shown the court has power to alter the usual 30-day time period between arraignment and the omnibus hearing. The defendant thus in a proper case may immediately upon arraignment join motions for relief under Rule 12(e) and for an immediate omnibus hearing under Rule 12(f)(1), asserting the ripeness and dispositive nature of the issue he presents as cause for the latter motion. (2) The discovery purpose of the preliminary examination is satisfied by the

liberal deposition and discovery procedure available to the defendant under Rules 15 and 16 as implemented through the omnibus hearing provided by Rule 12(f). See Reporter's Notes to Rules 12(f), 15, 16.

Rule 5(d) is based upon Federal Rule 5(c) and ABA Minimum Standards §4.3(b), (c). The judicial officer's statement is the first formal presentation of the charge to the defendant and thus "should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice." ABA Minimum Standards §4.3(a). To inform the defendant of the charge and give him a copy of it, as provided in paragraph (1), is a necessary preliminary to his formulation of a plea and taking any other defensive steps. A similar requirement existed under prior law. 13 V.S.A. §6551 (repealed by Act No. 118 of 1973, §25). Paragraph (2) implements the requirement of the Public Defender Act, 13 V.S.A. §5234, that the defendant be informed of the right of an indigent to counsel at state expense. Although many defendants may have learned of this right at a prior stage in the proceedings by virtue of the warnings required of the police under Miranda v. Arizona, 384 U.S. 436 (1966), a further warning by the judicial officer is essential to bring home the right to counsel for defendants appearing upon citation or summons and to assure that the right to counsel for all subsequent stages of the proceedings is understood even by defendants already warned. The requirement of 13 V.S.A. §5234 that the Public Defender be notified of an unrepresented defendant continues independent of the rule. Note that by virtue of Argersinger v. Hamlin, 407 U.S. 25 (1972), and 13 V.S.A. §5201(a)(4), as amended, the right to counsel attaches whenever imprisonment may be imposed upon conviction. See Reporter's Notes to Rule 44.

Rule 5(d)(3) provides for the balance of the Miranda

warning. As with notification of the right to counsel, it is essential that all defendants, whether previously warned or not, understand that their Fifth Amendment rights continue through the formal, judicial stages of the proceedings. See 1 Wright, supra, §78. Paragraphs (4) and (5) are added to make sure that on the practical level the defendant understands the context in which he must exercise his rights. It is particularly important to the workings of the pretrial release system under Rule 46 and 13 V.S.A. §7553a that the defendant be aware of its availability and terms. Further, the defendant without a lawyer must have a clear understanding of the procedural steps that are to follow, so that he may either obtain counsel or properly prepare for his own defense.

Rule 5(e) is based upon ABA Minimum Standards §4.3(d). As prior Vermont law recognized, the right to counsel can be effective only if adequate time for consultation is allowed. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Cf. In re Clarence Robinson, 125 Vt. 343, 215 A.2d 525 (1965). Under the rule, assignment of and consultation with counsel must be allowed before any further steps are taken at the Rule 5 hearing. If the arraignment itself is to be held at the hearing, as permitted by Rule 5(f), counsel must be present, for arraignment is a "critical stage." Hamilton v. Alabama, 368 U.S. 52 (1963); White v. Maryland, 373 U.S. 59 (1963). The decision as to when to plead is so intertwined with the decision what to plead that counsel must be assigned prior to the Rule 5(f) determination. See ABA Minimum Standards (Pleas of Guilty) §1.3, Commentary. Likewise, the Supreme Court has indicated that a preliminary hearing at which bail is set is a "critical stage," in part because of the importance of a lawyer's arguments on the right to and conditions of release. See Coleman v. Alabama, 399

U.S. 1 (1970). The assignment of counsel must thus precede the release hearing under Rule 5(g) as well.

Rule 5(f) makes clear that the arraignment is in form a proceeding separate from the Rule 5 hearing. See Rule 10 and Reporter's Notes thereto. The rule reflects practice under 13 V.S.A. §6551 (repealed by Act No. 118 of 1973, §25), which allowed the defendant to defer his plea until at least twenty-four hours after receiving a copy of the indictment or information. The delay could be waived, however. In re Robinson, 125 Vt. 343, 215 A.2d 525 (1965). Accordingly, the common practice was for the arraignment to be held at the bail hearing. Under the rule, if the judicial officer before whom the defendant appears is a judge of the court in which the offense will be tried, the defendant may request that the arraignment be held immediately as part of the Rule 5 hearing. If the defendant does not request immediate arraignment, the judicial officer is to set a place, date, and time for arraignment according to the mutual convenience of the parties and the court. The time set may be within twenty-four hours only if the defendant requests it.

Under Rule 5(g), the pretrial release hearing required under Rule 46 and 13 V.S.A. §7553a is to be held as part of the Rule 5 appearance. See ABA Minimum Standards §4.3 (e). At this hearing, conditions of release pending trial will be set for arrested defendants released temporarily under Rule 5(b), as well as for those who have remained in custody pending appearance. A defendant who has appeared in response to a citation or summons, however, ordinarily need not be subject to conditions of release pending trial. The release decision resulting in the issuance of the citation or summons will be the basis for the defendant's continued release, unless the state moves under Rule 46(b) to have conditions of release imposed for cause shown. See Reporter's Notes to Rule 46.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; OMNIBUS HEARING

(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and the defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Unless otherwise ordered for cause under subdivision (g) of this rule, the following must be raised prior to trial if then known to the party:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding); or

(3) Motions to suppress evidence on the ground that it was illegally obtained; or

(4) Requests for discovery under Rule 16 or 16.1; or

(5) Request for a severance of offenses or defendants under Rule 14.

(c) MOTION DATE. Except as otherwise provided in these rules or as otherwise ordered by the court, all motions and other requests prior to trial shall be made at or before the omnibus hearing provided in subdivision (f) of this rule.

(d) RULING ON MOTION. A motion made before trial

shall be determined at the omnibus hearing, but the court, if neither party would be prejudiced, may order that it be deferred for determination at the trial of the general issue or until after verdict. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(e) MOTION TO DISMISS FOR LACK OF PRIMA FACIE CASE.

(1) *Motion.* The defendant may, at any time after arraignment, move for dismissal of the indictment or information on the ground that the prosecution is unable to make out a prima facie case against him. The motion shall specify the factual elements of the offense which the defendant contends cannot be proven at trial.

(2) *Hearing and Determination.* The motion shall be heard at the omnibus hearing or, if discovery is not then complete, upon the completion of discovery. At the hearing, if the prosecution does not establish by affidavits, depositions, sworn oral testimony, or other admissable evidence that it has substantial, admissible evidence as to the elements of the offense challenged by the defendant's motion, or a lesser included offense, sufficient to prevent the grant of a motion for judgment of acquittal at the trial, the court shall dismiss the indictment or information without prejudice and discharge the defendant. If the prosecution has sufficient evidence of a lesser included offense, the court shall enter an order dismissing the offense charged and specifying the lesser included offense remaining for trial. The defendant may cross-examine witnesses and introduce affidavits or further evidence in his own behalf. Any question of law determinative of the issues raised by the defendant's motion that could be raised by motion under subdivision (b) of this rule shall be determined at the hearing held under this subdivision.

(3) *Form of Affidavits.* Affidavits offered by either party shall be made on personal knowledge, shall set forth such

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Sworn or certified copies of all papers or parts thereof referred to in the affidavits or offered independently shall be filed and served with the motion.

(f) OMNIBUS HEARING.

(1) *Hearing; Date.* Upon request of a party, upon the court's own motion, or when necessary to dispose of pending motions, an omnibus hearing shall be held in any case in which a plea of not guilty is entered. Unless otherwise ordered by the court on motion for cause shown, the omnibus hearing shall be held 30 days after the defendant is arraigned.

(2) *Same; Checklist.* At the omnibus hearing the court, on its own motion, using an appropriate check-list form, should

(A) Ensure that standards regarding provision of counsel have been complied with;

(B) Ascertain whether discovery has been completed (including compliance by the prosecution with the requirements of Rule 16(a)(2)) and whether additional discovery will be sought and make necessary orders to expedite all discovery;

(C) Make rulings on any motions or other requests then pending and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(D) Ascertain whether there are any procedural or constitutional issues which should be considered;

(E) Upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference;

(F) Upon the defendant's request, permit him to change his plea;

(G) Ask the defendant whether he intends to offer evi-

dence of an alibi defense and, if he does, to state for the record or supply to the prosecuting attorney at such later time as the court may direct, the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi;

(H) Ask the defendant whether he intends to rely upon the defense of insanity at the time of the alleged crime, or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, and, if he does, to state for the record, or supply to the prosecuting attorney at such later time as the court may direct, the names and addresses of the witnesses whom he intends to call to testify in order to establish such defense or defenses; and

(I) If the defendant states his intention to offer evidence of an alibi defense, direct the prosecuting attorney within such time thereafter as the court shall order to inform the defendant of the names and addresses of those upon whom the state intends to rely to establish defendant's presence at the scene of the alleged offense.

(3) *Conduct of Hearing.* Any and all issues may be raised by counsel or the court without prior notice and may be informally disposed of at the hearing. If additional discovery, investigation, or preparation, or evidentiary hearing or formal presentation is necessary for the fair and orderly determination of any issue, the hearing shall be continued from time to time until all matters raised are properly disposed of.

(4) *Binding Effect of Stipulations.* Stipulations made by any party or his counsel at the hearing are binding upon the parties at the trial unless set aside or modified by the court in the interests of justice.

(5) *Memorandum.* At the conclusion of the hearing, a

summary memorandum should be dictated into the record or prepared by the court and placed on file, indicating disclosures made, rulings and orders of court, stipulations, and any other matters determined or pending.

(g) Effect of Failure to Raise Issues. Failure by the defendant to present any of the defenses, objections, or requests required by subdivision (b) of this rule to be made prior to trial, or to raise any other pretrial errors or issues of which the party has knowledge, at the times provided in subdivisions (c) and (e) of this rule shall, except as otherwise provided in these rules and subject to constitutional limitations, constitute waiver thereof. The court for cause shown may grant relief from the waiver.

(h) Records. All proceedings at any hearing conducted under subdivision (e) or (f) of this rule or by order of court, including any findings of fact and conclusions of law that are made orally, shall be taken down by a court reporter or recording equipment.

(i) Effect of Determination of Motion. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that the conditions of his release be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any statute relating to periods of limitations.

RULE 12(e). REPORTER'S NOTES

Rule 12(e) is unique to these rules and changes prior practice. In contrast to the Federal Rules and the procedural systems of many states, the Vermont Rules do not provide an automatic preliminary hearing at which the defendant may require the prosecution to present a prima facie case before he is bound over for trial. Rules 4(b) and 5(c) assure that

the constitutional requirement of an independent finding of probable cause to arrest is met. The Vermont Rules, however, proceed on the assumption that there is no constitutional right to a further probable cause hearing as a basis for the binding over, at least where procedures such as the release system provided by Rules 3, 4, and 46; the omnibus hearing required by Rule 12(f); and the broad discovery allowed by Rule 16 are available to prevent unwarranted detention and trial. See Reporter's Notes to Rule 5(c). Further, an automatic preliminary hearing would serve no useful purpose in light of the availability of the omnibus hearing and discovery. Rule 12(e), by contrast to the automatic procedure, provides a narrow form of preliminary hearing, available only on motion, for issues that may be dispositive of the case. Arrest validation and discovery are left to other devices. Under these rules, the defendant is entitled to a full presentation of the prosecution's case only when such a presentation may lead to dismissal of the indictment or information. The Rule 12(e) hearing is thus narrower in scope than the probable cause hearing permitted on motion in prior practice. See In Re Davis, 126 Vt. 142, 224 A.2d 905 (1966); State v. Perry, 131 Vt. 75, 300 A.2d 615 (1973), discussed in Reporter's Notes to Rule 5(c). For the form of motion, see Official Form 21.

Rule 12(e)(1) specifies that defendant's motion is to be grounded on the prosecution's inability to make out a prima facie case and is to state the factual elements in which the prosecution's case is deficient. While there is no sanction against the filing of frivolous or dilatory motions, there is little advantage to the defense in so doing. The motion is, by virtue of Rule 12(e)(2), ordinarily to be heard at the omnibus hearing and may be opposed simply by affidavits if the prosecution so wishes. If the defendant has no substantial basis for his motion, the making of it will neither delay

proceedings nor cause the prosecution the time and expense of a full presentation. Moreover, under Rules 15 and 16, the defendant, prior to the omnibus hearing, can obtain any information about the prosecution's case which a full presentation would provide.

Under Rule 12(e)(1), the motion may be made at any time after arraignment. While ordinarily the motion will not be heard until the omnibus hearing, 30 days later, hearing may be expedited under Rules 5(f) and 12(f)(1) in a clear case with a single dispositive issue such as a question of mistaken identity. See Reporter's Notes to Rule 5(c).

Rule 12(e)(2) is in some respects similar to Civil Rule 56, providing for summary judgment. The prosecution need only show that it has enough evidence to go to the jury on the issue raised by the defendant — that is, that taking the evidence in its most favorable construction to the state it reasonably tends to show defendant's guilt beyond a reasonable doubt. See Reporter's Notes to Rule 29. Moreover, the prosecution may establish its case by affidavits of witnesses as to their potential testimony. See Rule 12(e)(3) (taken from Civil Rule 56(e)). Also, the rule allows the court to narrow the issues by dismissing the offense charged but specifying a lesser included offense for trial. In contrast to the Civil Rule, however, either party may call witnesses and offer real evidence, and the defendant may force the state to a greater degree of proof by cross-examining the state's witnesses or calling them as hostile witnesses. Finally, Rule 12(e)(2) allows questions of law to be decided by the same expeditious procedure.

RULE 15. DEPOSITIONS

(a) WHEN TAKEN. A defendant or the state, at any time after the filing of an indictment or information, may take the deposition of a witness, provided that no deposition

may be taken more than 30 days after arraignment, or after the date set for the omnibus hearing if that date is later, except by leave of court granted for cause shown.

RULE 16. DISCOVERY BY DEFENDANT

(a) PROSECUTOR'S OBLIGATIONS. Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

(A) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if the trial is to be a joint one;

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness; and

(F) any record of prior criminal convictions of the defendant.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at the omnibus hearing, disclose the foregoing items or state on the record that they do not exist.

(b) SAME: COLLATERAL OF EXCULPATORY MATTER. The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(c) SAME: SCOPE. The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who

either regularly report, or with reference to the particular case have reported, to his office.

(d) MATTERS NOT SUBJECT TO DISCLOSURE.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required where his identity is a prosecution secret, unless a failure to disclose will infringe the constitutional rights of the defendant, or the identity of the informant is a material fact in a defense to be offered by defendant. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing and trial.